No. 80-237

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

STATE OF OHIO,

Petitioner,

vs.

CAROLYN YOUNG,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

SIMON L. LEIS, JR.
Prosecuting Attorney

LEONARD KIRSCHNER
Assistant Prosecuting Attorney

THOMAS P. LONGANO
Assistant Prosecuting Attorney

F. DAVID ALBANESE
Assistant Prosecuting Attorney

420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202
(513) 632-8553

Attorneys for Petitioner

BRETT GOODSON
Attorney at Law
20 West 9th Street
Cincinnati, Ohio 45202
(513) 621-2999

Attorney for Respondent

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTIONS PRESENTED FOR REVIEW

Ohio Revised Code, Section 2923.04, sets forth ascertainable standards of guilt and is not void for vagueness in contradiction to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

FOOTNOTE: In accordance with Supreme Court Rule 21.1 (b) we submit that the names of all parties involved in this case have been set forth in the caption of this case. However, for the purposes of clarification we submit that the only case currently being petitioned for, is the case of *State of Ohio* v. *Carolyn Young*. At the time the Ohio Supreme Court heard the *Young* case, currently before this Court, they also heard the case of *State of Ohio* v. *George Forbes,* which was from Cuyahoga County. The attorneys representing the State of Ohio in that case were John T. Corrigan, Cuyahoga County Prosecuting Attorney and George J. Sadd, Cuyahoga County Assistant Prosecuting Attorney, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113. Representing the defendant George Forbes in that case was the law firm of Berkman, Gordon, Kancelbaum, Levy and Murray, through Mr. Bernard A. Berkman and Mr. J. Michael Murray whose address is 2121 The Illuminating Building, 55 Public Square, Cleveland, Ohio 44113.

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OCTOBER TERM, 1979

STATE OF OHIO,

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vs.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

OPINIONS BELOW

The June 18, 1980 opinion of the Ohio Supreme Court is set forth in Appendix "A" of this brief. The opinion of the Court of Appeals is set forth in Appendix "B".

JURISDICTION

On June 18, 1980, the Ohio Supreme Court in a 4-3 split decision rendered their decision which held that Ohio

Revised Code, Section 2923.04 was unconstitutional as being void for vagueness and overbroad and contradiction to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Jurisdiction is pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2923.04 Engaging in organized crime

> "(A) No person, with purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall do any of the following:
>
> (1) Organize or participate in organizing a criminal syndicate or any of its activities;
>
> (2) Provide material aid to a criminal syndi-

cate or any of its activities, whether such aid is in the form of money or other property, or credit;

(3) Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility;

(4) Furnish legal, accounting, or other managerial services to a criminal syndicate;

(5) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis;

(6) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of violence;

(7) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of bribery in violation of section 2921.02 of the Revised Code.

(B) Whoever violates this section is guilty of engaging in organized crime, a felony of the first degree.

(C) As used in this section, 'criminal syndicate' means five or more persons collaborating to promote or engage in any of the following on a continuing basis;

(1) Extortion or coercion in violation of section 2905.11 or 2905.12 of the Revised Code;

(2) Compelling or promoting prostitution, or procuring, in violation of section 2907.21, 2907.22, or 2907.23 of the Revised Code;

(3) Any theft offense as defined in section 2913.01 of the Revised Code;

(4) Any gambling offense as defined in section 2914.01 of the Revised Code;

(5) Illegal Trafficking in drugs of abuse, in intoxicating or spirituous liquor, or in deadly weapons or dangerous ordnance as defined in section 2923.11 of the Revised Code;

(6) Lending at usurious interest, and enforcing repayment by illegal means;

(7) Any offense, for the purpose of gain.

(D) A criminal syndicate retains its character as such even though one or more of its members does not know the identity of one or more other members, and even though its membership changes from time to time."

Ohio Revised Code Section 109.83 defines organized criminal activity as:

"Organized criminal activity means any combination or conspiracy to engage in criminal activity as a significant source of income or livelihood, or to violate or aid, abet, facilitate, conceal, or dispose of the proceeds of the violation of criminal laws relating to prostitution, gambling, counterfeiting, obscenity, extortion, loan sharking, drug abuse or illegal drug distribution, or corruption of law enforcement officers or other public officers, officials, or employees."

STATEMENT OF THE CASE

The defendant along with 23 co-defendants was indicted on October 27, 1977 for the crime of engaging in organized crime in violation of Ohio Revised Code 2923.04. After various pre-trial motions the defendant entered her plea of No Contest to the charges in said indictment on April 6, 1978 and was found guilty on said plea. Defendant was sentenced to a term of four (4) to twenty-five (25) years and her sentence was suspended and she was placed on five (5) years probation. A timely Notice of Appeal was filed to the Court of Appeals of the First Appellate District. On April 4, 1979 the Court of Appeals reversed the judgment of conviction declaring Ohio Revised Code Section 2923.04 unconstitutional. Thereafter, the Court of Appeals certified their judgment to the Ohio Supreme Court on the basis that three other appellate jurisdictions had declared the statute to be constitutional A short time after the Court of Appeals of the First Appellate District rendered their decision in this case (State vs. Young) the Court of Appeals of the Eighth Appellate District also found the statute to be unconstitutional. The Supreme Court of Ohio joined that case (State vs. Forbes) with the case for which certiorari is sought for the purposes of the argument. The Ohio Supreme Court on June 18, 1980 in a 4-3 split decision determined the Ohio Revised Code Section 2923.04 was unconstitutional. This petition for a Writ of Certiorari is from that decision.

The background facts upon which the indictment was based reflected a large organization of individuals (23 of whom were indicted on this charge) who jointly through their mutual efforts, stole, passed bad checks, etc. in order to purchase narcotics. In more simple terms the divisions of the organization were broken down into five major divisions; to-wit: a theft group, a burglary group, a forgery

group, a receiving and passing bad checks, etc. group and a group supplying the narcotics.

The theft group would go around to various parking lots at shopping centers and break into automobiles and remove cash, blank checks and credit cards from the automobiles. They would carefully put all other matters back in place in the car; including billfolds and purses. They would then relock the car so that when the owner came back to his car nothing would look out of place and the owner would not suspect anything wrong until such time as he needed the credit card or the money or the blank check.

The burglary group would operate along the same general lines as the theft group and take only cash, credit cards or blank checks.

The forgery group would receive the checks and make them out for others to pass.

The receiving group would receive the filled in forged checks and the credit cards and then go out and pass them using; amongst other things, the stolen credit cards as identification. The receiving group would then turn the proceeds into the overseeing group would would purchase narcotics for everybody in the various specialty rings.

The whole operation was systematized by a group of individuals at the top who supervised the various operations between the groups and who furnished the various groups and their participants the appropriate shares of the narcotics purchased. The entire operation was similar to a major corporation with integrated criminal divisions all operating under the supervision of a group at the top. According to the Bill of Particulars which has been filed in this case; during the period of time involved in this indict-

ment (7 months) the criminal operations netted over $100,000.00.

The defendant Carolyn Young was a part of the receiving group that passed bad checks and stolen credit cards.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

The majority of one in the Ohio Supreme Court in their 4-3 split decision erred in declaring Ohio Revised Code Section 2923.04 as being unconstitutional in contradiction to the due process clause of the Fourteenth Amendment. The Ohio Supreme Court said that this statute was too indefinite and uncertain. We strongly disagree with that interpretation.

In order to properly interpret this statute we believe that certain pronouncements of this Court must be observed.

First and foremost we believe that the pronouncement of this Court in *United States* v. *Harriss,* 347 U.S. 612 (1954) at page 617 clearly sets forth the requirements of "definiteness" of a criminal statute. This Court stated in the *Harriss* case (supra) at page 617:

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

We look to the Ohio statute to see if the statute gives a person of ordinary intelligence fair notice that his contemplated action is forbidden by statute.

Before we go into the specifics of the Ohio statute, we believe that we must check out certain of this Court's pronouncements in determining whether or not a statute is unconstitutional as being vague and overbroad.

As this Court went on to say in the *Harriss* case (supra) at page 618:

> ". . . If the general class of offenses at which the statute is directed is plainly within its terms the statute will not be struck down as vague even though marginal cases could be put where doubts might arise . . . and if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction."

As the Court stated in the case of *United States* v. *Petrillo,* 332 U.S. 1 (1946) at page 7:

> "We think that the language Congress used provides an adequate warning as to what conduct falls under its bans, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is not sufficient reason to hold the language too ambiguous to define a criminal offense. . . . The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; BUT THE CONSTITUTION

DOES NOT REQUIRE IMPOSSIBLE STANDARDS." (Capitalization ours for emphasis.)

We then look to the relevant features of the Ohio statute.

Ohio requires knowledge and intent. The mere aiding or assisting someone without knowing either what you are doing or what you are facilitating is not covered under the Ohio statute.

Ohio Revised Code, Section 2923.04 (A) provides in part:

"No person with PURPOSE TO ESTABLISH OR MAINTAIN A CRIMINAL SYNDICATE or to FACILITATE ANY OF ITS ACTIVITIES, shall do any of the following . . ." (Capitalization ours for emphasis.)

There must be the purposeful intent to do the act in question.

We then look to the prohibited activity which must be purposely done.

Section 2923.04 (A) (1) provides that you cannot intentionally organize or participate in organizing a criminal syndicate (criminal syndicate is clearly defined in O.R.C. 2923.04 (C)). It is extremely doubtful that anyone could say this section is vague or overbroad.

Section 2923.04 (A) (2) provides that you cannot wilfully provide material aid to a criminal syndicate.

Section 2923.04 (A) (3) provides you cannot willfully and intentionally manage, supervise or direct any of the activities of the criminal syndicate.

Section 2923.04 (A) (4) prohibits the willful furnishing

of legal, accounting or other managerial services to the criminal syndicate with the intent to facilitate its activities.

Section 2923.04 (A) (5) prohibits the willful commission of or conspiracy or attempt to do any act or acts which a criminal syndicate engages in on a continuing basis.

Section 2923.04 (A) (6) prohibits the purposeful and willful commission of conspiracy to commit an act of violence.

Section 2923.04 (A) (7) prohibits the purposeful commission or attempted commission of bribery in violation of a specific statute.

It is extremely difficult to comprehend how the above can be determined to be vague or overbroad. This is especially so since the words criminal syndicate have been defined in O.R.C. 2923.04 (C).

We believe that several Federal statutes which have been declared by this Court and other Federal Courts to be constitutional would clearly reflect the constitutionality of the Ohio Section under attack.

First and foremost it is to be noted that the Ohio legislature based this code section on the then proposed Federal Criminal Code.

18 U.S.C. 1952 is the Federal Statute on racketeering. That statute prohibited interstate travel with intent to promote, manage, establish, carry on or facilitate certain kinds of illegal activity. This statute is aimed primarily at organized crime. This law reads as follows:

> " (a) Whoever travels in the interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

The constitutionality of this section was upheld and found not to be vague in the case of *United States* v. *Villano,* 529 F. 2d 1046, cert. den. 96 S. Ct. 3180, 426 U.S. 953.

The Court in *Villano,* supra, stated:

"While the phrase including the word promote was

held impermissibly vague in the First Amendment setting, we are satisfied that the statutory provisions in question here convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice." (Page 1053).

The issue of vagueness in determining the constitutionality question has been rule favorably for the State in a number of cases. More specifically, the case of *Bass* v. *United States,* 324 F. 2d 168 (1963), which says that the Court held that the racketeering statute previously mentioned is not constitutionally questionable for vagueness but embraces commonly clear words and prescribes clear standards (see *United States* v. *Gerhart,* 275 F. Supp. 443 (1963); *United States* v. *Barrow,* 363 F. 2d 62, cert. denied 385 U.S. 101 (1963); *United States* v. *Bash,* 258 F. Supp. 807, affirmed, 379 F. 2d 483, cert. denied 389 U.S. 930 (1966); *United States* v. *Teemer,* 214 F. Supp. 952 (1963).

As it can easily be seen the Federal statute on interstate Racketeering is not as detailed as Ohio's Organized Crime Statute yet it was upheld as constitutional.

We have affixed as our Appendix C the defintions of racketeering as defined in 18 U.S.C. 1961. Our Appendix D sets forth the prohibited activities.

Section 1962 was held not to be unconstitutionally vague and ambiguous. The concept of affecting interstate or foreign commerce is so well imbedded in the law as not to mislead anyone who engages in this activity. *United States* v. *Campanale,* 518 F. 2d 352, cert. den. 96 S. Ct. 777, 423 U.S. 1050, rehearing denied 96 S. Ct. 1422, 424 U.S. 950.

It has been held that our federal legislature is entitled to make more than one crime within a specified time frame

and in a course of a particular type of activity or enterprise a pattern of racketeering prohibited by law. This is so even though racketeering is an independent criminal offense which punishes more severely than just twice the penalty for each separate offense. *United States* v. *Field,* 432 F. Supp. 55, affirmed 578 F. 2d 1371, certiorari dismissed 90 S. Ct. 43.

Congress is not prohibited by any constitutional principle which would serve to stop the Congress from making the commission of two crimes within a certain time frame and of a certain pattern of activity a crime regardless of whether or not a sequence of two similar acts amounts to a pattern as that term is usually understood. *United States* v. *Field,* supra.

Section 1962 likewise does not offend the fundamental demand of due process that guilt remain individual and personal where a defendant is a member of a criminal enterprise where he objectively manifests an intention to actively engage in the criminal enterprise through the commission of two or more defined crimes. *United States* v. *Elliott,* 571 F. 2d 880 (1978), rehearing denied, 575 F. 2d 300; *United States* v. *Parness,* 503 F. 2d 430, certiorari denied 95 S. Ct. 775, 419 U.S. 1105. This section is not unconstitutionally vague as construed to extend to illegitimate as well as legitimate enterprises. *United States* v. *Castellano,* 416 F. Supp. 125 (D.C.N.Y. 1975).

It is submitted that Ohio's organized crime statute, like the Federal Statutes cited, is not vague. It is a basic principle of due process that an enactment is not void if its prohibitions are clearly defined. Beginning with the basic premise that man is free to decide between lawful and unlawful activity, a law must give a person of ordinary intelligence a reasonable opportunity to know what activity

or conduct is prohibited so that he can decide how he will act. Fair warning is all that need be given. *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972), 92 S. Ct. 2294.

In regard to whether or not a law is overbroad it cannot prohibit constitutionally protected conduct. *Grayned,* supra. Ohio's organized crime statute is not overbroad because it prohibits criminal activity or conduct only and not constitutionally protected activity. As the statute specifically states activities such as bribery, extortion, promoting prostitution, theft, illegal trafficking in drugs, lending at usurious interest rates are clearly prohibited.

The federal statute, Section 1961, prohibits similar conduct. It prohibits gambling, bribery, extortion, dealing in narcotics, etc. which are just as clearly defined as Ohio's Statute.

The only activities which the organized crime statute prohibits are those performed with the purpose of establishing or maintaining a criminal syndicate or facilitating its activities. Any claim that Ohio's organized crime statute is vague or overbroad is not well founded because the sweep of the statute is narrowed by the scienter element. The statute specifically states that "no person, with purpose to establish or maintain a criminal syndicate or to facilitate any of its activities; . . . ."

We submit that this requirement of scienter in the organized crime statute is in and of itself sufficient basis to uphold a statute under attack for vagueness or overbreath. The Supreme Court of the United States has upheld on numerous occasions statutes which require scienter. *Cole* v. *Richardson,* 405 U.S. 676 (1972); *Colton* v. *Kentucky,* 407 U.S. 104 (1972).

It is further submitted that a statute should not be held to be invalid for overbreath if a limiting construction could

be placed on it by the state court. *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973).

We feel that the Ohio Statute is not "vague" as the Ohio Supreme Court Majority alleged in their opinion. We feel that the first thing that must be done is to see what the word "vague" means. The word "vague" is defined in Webster's Twentieth Century, unabridged dictionary, second edition as:

> "Not clearly, precisely, or definitely expressed or stated in . . . not sharp, certain or precise in thought or expression . . . not precisely determined or known . . ."

We then look to the statute to see whether this statute is so vague.

The statute begins with the words "no person". We find nothing vague or uncertain as to this phrase. In simple language it means anyone.

The statute then goes on to say "with purpose to establish or maintain a criminal syndicate."

We feel there is nothing uncertain or indefinite on these phrases. When a person does something purposely he does it intentionally. We then look to where the purpose is directed: "to establish or maintain a criminal syndicate".

Therefore, the purpose is to establish or maintain something. What is that something? The something is a criminal syndicate. The Court of Appeals might be correct in not knowing what "a criminal syndicate was except for the fact that the legislature has defined a criminal syndicate".

Ohio Revised Code 2923.04 (C) says:

"As used in this section, 'criminal syndicate' means five or more persons collaborating to promote or engage in any of the following on a continuing basis."

"1. Extortion or coercion in violation of section 2905.11 or 2905.12 of the Revised Code.

2. Compelling or promoting prostitution . . . .

3. Any theft offense as defined in 2913.01 of the Revised Code.

4. Any gambling offense as defined in Section 2915.01 of the Revised Code.

5. Illegal trafficking in drugs of abuse . . .

6. Lending at usurious interest, and enforcing repayment by illegal means;

7. Any offense for the purpose of gain."

The statute is clear and it is limited. Each offense is clearly defined.

The statute says there must be five or more persons in the syndicate. The statute says that this code section is limited in application to situations falling under the 7 specific items.

We find it inconceivable to find out where the vagueness that the Majority Opinion of The Ohio Supreme Court speaks of exists in this statute.

This is not a situation of five or more persons engaged in a lawful enterprise. The statute is predicated on the five or more persons committing a crime.

As the dissenting opinion of three justices of the Ohio Supreme Court reflected, the majority opinion was conjuring up ridiculous imaginary situations.

As this Court said in the case of *Communications Association* v. *Douds,* 339 U.S. 382 (1950) at page 412:

> "There is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question. The applicable standard, however, is not one of wholly consistent academic definition of abstract terms. It is rather, THE PRACTICAL CRITERION OF FAIR NOTICE TO THOSE TO WHOM THE STATUTE IS DIRECTED." (Capitalization ours for emphasis.)

A "strong presumptive validity that attaches to an Act . . . has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language". (*United States* v. *Nat. Dairy Corp.,* 372 U.S. 29 at p. 32).

CONCLUSION

The Ohio Supreme Court by a 4-3 split majority determined that Ohio Revised Code 2903.04 was unconstitutional in contradiction to the United States Constitution.

We believe that the Ohio statute is neither vague nor overbroad.

We believe that the dissenting opinion in the Ohio Supreme Court followed the mandates and pronouncements of this Court when they reflected that the Ohio Statute was constitutional.

We further submit that over 100 other defendants in Ohio are awaiting the pronouncements by this Court on

the Federal constitutional issues as improperly interpreted by the majority opinion of the Ohio Supreme Court.

We therefore request that you grant certiorari in this case.

Respectfully submitted,

SIMON L. LEIS, JR.
Prosecuting Attorney

LEONARD KIRSCHNER
Assistant Prosecuting Attorney

THOMAS P. LONGANO
Assistant Prosecuting Attorney

F. DAVID ALBANESE
Assistant Prosecuting Attorney

420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202

Attorneys for Petitioner

APPENDIX A

THE STATE OF OHIO, APPELLANT, v.
YOUNG, APPELLEE.
THE STATE OF OHIO, APPELLANT, v.
FORBES ET AL., APPELLEES.

[Cite as State v. Young (1980), 62 Ohio St. 2d 370.]

Criminal law—Engaging in organized crime—R. C. 2923.04 —Constitutionality—Void for vagueness—Due process —Fourteenth Amendment, U.S. Constitution.

R. C. 2923.04 fails to establish ascertainable standards of guilt and is, therefore, void for vagueness under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

(Nos. 79-728 and 79-1124—Decided June 18, 1980.)

CERTIFIED by the Courts of Appeals for Hamilton and Cuyahoga Counties.

Two cases have been consolidated herein. In the one cause (case No. 79-728), defendant-appellee, Carolyn N. Young, was indicted with 23 other individuals for violating R. C. 2923.04, this state's organized crime statute. Following her indictment, appellee moved to dismiss the charge on the basis that R. C. 2923.04 was unconstitutional. The motion was denied by the Court of Common Pleas of Hamilton County. Appellee then entered a plea of no contest to the charge of engaging in organized crime. She was found guilty. The Court of Appeals for Hamilton County held R. C. 2923.04 (A) (1), (2), (3) and (5) to be unconstitutional and reversed the conviction and discharged appellee.

In the second cause (case No. 79-1124), defendant-appellees, George L. Forbes, Ceasar Moss, James H. Boyd, Carlton Rush, Curtis J. Watkins, Carl Bayer, David E. Cohen, Raymond Bona, Eugene L. Hazen, Thomas Layer, Ernie Mills, and Virgil Shively, were indicted for engaging in organized crime in violation of R. C. 2923.04 (A) (1), (2), (3) and/or (5). Upon appellees' motion, and pursuant to a hearing, the Court of Common Pleas of Cuyahoga County declared the statute unconstitutional and dismissed the indictments against appellees. Upon appeal, this determination was affirmed by the Court of Appeals for Cuyahoga County.

The judgments of these two appellate courts were found to be in conflict with the unreported decisions of the Court of Appeals for Summit County in *State* v. *Byars* (December 21, 1977, No. 8543) and the Court of Appeals for Fairfield County in *State* v. *Houlihan* (November 1, 1978, No. 11 CA 78), and the records of these causes were certified to this court for review and final determination.

Subsequent to certification of both cases, the state of Ohio (hereinafter appellant) moved this court for an order consolidating the two cases, and, on September 12, 1979, the motion was allowed.

Mr. Simon L. Leis, Jr., prosecuting attorney, *Mr. Leonard Kirschner, Mr. Thomas P. Longano* and *Mr. F. David Albanese,* for appellant in case No. 79-728.

Mr. John T. Corrigan, prosecuting attorney, and *Mr. George J. Sadd,* for appellant in case No. 79-1124.

Mr. Brett, Goodson, for appellee in case No. 79-728.

Messrs. Berkman, Gordon, Kancelbaum, Levy & Murray, Mr. Bernard A. Berkman and *Mr. J. Michael Murray,* for appellees in case No. 79-1124.

PAUL W. BROWN, J. In recent years the growing problem of organized crime has received heightened attention by this state, and indeed by our entire nation. Many legislative bodies, including the United States Congress, have sought to combat these criminal activities through the enactment of legislation designed to reach deep within criminal organizations. To this effect, our General Assembly enacted R. C. 2923.04. We so preface this opinion only to make clear that our examination of this provision relates only to its constitutional posture and is not intended as an indictment of the General Assembly's well-intended motives.

Appellees' primary contention in the instant cause is that the statute is unconstitutionally vague under the Fourteenth Amendment to the United States Constitution. It is well established that criminal statutes are void for vagueness under the Due Process Clause of the Fourteenth Amendment if they fail to contain "ascertainable standards of guilt." *Winters* v. *New York* (1948), 333 U.S. 507, 515. See, also, *Columbus* v. *Thompson* (1971), 25 Ohio St. 2d 26, 30.

We noted last term that "the proper standard for determining if a statute is vague is found in *Connally* v. *General Construction Co.* (1926), 269 U.S. 385, and *Grayned* v. *Rockford* (1972), 408 U.S. 104." *State* v. *Phipps* (1979), 58 Ohio St. 2d 271, 273. In *Connally* v. *General Construction Co., supra,* the United States Supreme Court, at page 391, stated:

"That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the

settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. * * *" (Citations omitted.)

The standard was further examined in *Grayned* v. *Rockford, supra,* at pages 108-109, wherein it was explained that:

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

The statute in question must be reviewed against this constitutional background.[1] R. C. 2923.04 provides that:

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[1] The state in this cause relies heavily upon Section 1952, Title 18, U.S. Code, citing that federal interstate racketeering statute because it has withstood constitutional attacks on grounds similar to those claimed here. See, *e.g., Bass* v. *United States* (C. A. 8, 1963), 324 F. 2d 168, 173. We find an analogy to that law to be totally unpersuasive because that federal law does not contain identical provisions to those contained in R. C. 2923.04, nor was our statute patterned after that provision in the United States Code. The two laws are, in fact, almost completely different, except for the type of activity they attempt to prohibit.

"(A) No person, with purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall do any of the following:

"(1) Organize or participate in organizing a criminal syndicate or any of its activities;

"(2) Provide material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit;

"(3) Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility;

"(4) Furnish legal, accounting, or other managerial services to a criminal syndicate;

"(5) Commit, or conspire or atempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis;

"(6) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of violence;

"(7) Commit, or conspire or atempt to commit, or act as an accomplice in the commission of bribery in violation of section 2921.02 of the Revised Code.

"(B) Whoever violates this section is guilty of engaging in organized crime, a felony of the first degree.

"(C) As used in this section, 'criminal syndicate' means five or more persons collaborating to promote or engage in any of the following on a continuing basis:

"(1) Extortion or coercion in violation of section 2905.11 or 2905.12 of the Revised Code;

"(2) Compelling or promoting prostitution, or procur-

ing in violation of section 2907.21, 2907.22, or 2907.23 of the Revised Code;

"(3) Any theft offense as defined in section 2913.01 of the Revised Code;

"(4) Any gambling offense as defined in section 2915.01 of the Revised Code;

"(5) Illegal trafficking in drugs of abuse, in intoxicating or spirituous liquor, or in deadly weapons or dangerous ordnance as defined in section 2923.11 of the Revised Code;

"(6) Lending at usurious interest, and enforcing repayment by illegal means;

"(7) Any offense, for the purpose of gain.

"(D) A criminal syndicate retains its character as such even though one or more of its members does not know the identity of one or more other members, and even though its membership changes from time to time."

The Complexity of R. C. 2923.04 is readily apparent, and it is therefore necessary to analyze individually the various components of this statute to determine its constitutionality as a whole. For reasons stated hereinafter, it is our considered opinion that such an examination results in the inescapable conclusion that the statute is deficient in at least five respects and, thus, cannot pass constitutional muster.

While this court will attempt to construe the language of a statute in order to sustain its validity, "it must be recognized that a court, in interpreting a legislative enactment, may not simply rewrite it * * *." *Seeley* v. *Expert, Inc.* (1971), 26 Ohio St. 2d 61, 71. See, also, *Crane* v. *Cedar Rapids & Iowa City Ry. Co.* (1969), 395 U.S. 164, 167.

We also note that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States* v. *Bass* (1971), 404 U.S. 336, 348. The standards for vagueness also require more precision in the criminal context, than in other situations, such as in a regulatory context. *Salem* v. *Liquor Control Comm.* (1973), 34 Ohio St. 2d 244, 246.

With these principles of statutory construction in mind we turn to R. C. 2923.04 (A). First, in viewing division (A) of R. C. 2923.04, we recognize that a person must act with a "purpose to establish or maintain a criminal syndicate or to facilitate any of its activities," to be brought within the statute's prohibitions. The General Assembly clearly provided a scienter requirement of "purpose" as defined by R. C. 2901.22 (A). The statute, however, does not demand that this purpose must be manifested in the "facilitation" of a syndicate's *illegal* activities.

A three-judge federal panel, composed of District Judges Duncan and Kinneary together with Circuit Judge Peck, held subsection (A) (4) of R. C. 2923.04, dealing with legal, accounting, and managerial services, unconstitutional,[2] aptly pointing out that:

"The scienter element in R. C. 2923.04 does little to

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[2] This federal case is not binding upon this court, and we note the decision rendered in that case only as supporting authority. That case, brought under Section 2281, Title 28, U.S. Code, which has subsequently been repealed, resulted in a declaratory judgment deposing R. C. 2923.04(A)(4) on federal constitutional grounds. This finding was based upon First Amendment associational rights, the Sixth Amendment right to counsel, as well as due process vagueness concerns. R. C. 2923.04(A)(4) is not directly before this court in the instant cause, but because we are holding the scienter provisions of R. C. 2923.04(A) as well as the definitional provision contained in R. C. 2923.04(C) invalid, the entire statute must fail as being unconstitutionally vague.

limit the reach of the statute. The intent required is a 'purpose to * * * facilitate *any* of [the criminal syndicate's] activities. As written, then, the scienter element is not limited to activities undertaken to facilitate the *illegal* activities of a criminal syndicate. This is important; a criminal syndicate may engage in many activities which are not in and of themselves illegal. Some such activities, such as reporting income for federal tax purposes, are in fact required by law." *Amusement Devices Assn.* v. *Ohio* (1977), 443 F. Supp. 1040, 1051.

We are asked by appellant to make the assumption that the General Assembly intended to limit this scienter requirement to illegal activities. This reading, however, would be contrary to the clear language of the statute and would require reading the term "illegal" not only into R. C. 2923.04 (A) but also into subsections (A) (1), (A) (2) and (A) (3). It is argued that is the only statutory construction possible, but at least one Court of Appeals that held the statute to be constitutionally valid, read the statute literally, and construed it to reach a person who seeks to aid a criminal syndicate in *any* of its activities, legal or illegal. *State* v. *Powell et al.,* Court of Appeals for Summit County (November 28, 1979, C. A. Nos. 8878 etc.).

To read R. C. 2923.04 (A) as enacted, without insertion of the word "illegal" into the scienter requirement presents obvious legal difficulties. There exists a possibility that lawful activity may be punished under the statute as written. For example, a person selling eggs to a restaurant, known to be operated by a criminal syndicate, is aiding the activities of that organization and is thus within the scope of R. C. 2923.04. Criminal responsibility has never been assigned, however, to the vendor who supplies goods

readily available on the open market. See Lafave & Scott, Criminal Law. Section 64. Punishing such innocent conduct cuts against the grain of our entire system of criminal justice. *Papachristou* v. *Jacksonville* (1972), 405 U.S. 156. The General Assembly, in all probability, did not intend to reach such conduct, but may have sought to prohibit other activities that assist the legal operations of a criminal syndicate. One can envision primary functionaries within a criminal syndicate who restrict their activities to the syndicate's lawful operations, yet channel the profits from such activities into unlawful activities. These individuals may incur criminal responsibility for their actions and may be punished by a properly drafted statute.

R. C. 2923.04 (A) as drafted, however, fails to specify with reasonable clarity what kinds of activity it prohibits and, therefore, is unconstitutionally vague. It is fundamentaly principle that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey* (1939), 306 U.S. 451, at page 453 (footnote omitted).

There is a second independent problem with the scienter requirement in R. C. 2923.04 (A). This problem results because there is no requirement that a person know that his actions are aiding a criminal syndicate. An individual involved in the legal activities of a group, unaware of and with no connection to the unlawful side of the organization, is brought within the statute's prohibitions. For example, a real estate broker who handles the purchase of an apartment complex and an individual who then manages that complex, both have the purpose to engage in their respective conduct, but they have no intention of aiding a criminal operation. Yet, if a "criminal syndicate" is the

purchaser, these individuals are within the purview of R. C. 2923.04, because they have assisted the activities of that organization. The same conduct may be either legal or illegal depending upon whether it aided a criminal syndicate.[3]

The vague language of the statute, which subjects an individual to criminal sanctions for activities, the legality of which cannot be determined solely by the conduct itself but must be determined by factors which a person may be unaware of at the time of the conduct, violates due process. R. C. 2923.04 lacks the ascertainable standards of guilt that "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden * * *." *United States* v. *Harriss* (1954), 347 U.S. 612 at page 617; *Palmer* v. *Euclid* (1971), 402 U.S. 544.

The importance of clarity in the scienter requirements cannot be overemphasized in light of the sweeping reach of the statute and the stringent sanctions provided by R. C. 2923.04 (B).[4] The statute is far-reaching due to the defini-

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[3] As the United States Supreme Court has recognized in another context, "[t]he very absurdity of these possibilities brings into focus the extraordinary ambiguity of the statutory language." *Cramp* v. *Bd. of Public Instruction of Orange Co.* (1961), 368 U.S. 278, 286.

[4] We recognize the importance of a clear scienter element in upholding a legislative enactment. See *Colautti* v. *Franklin* (1979), 439 U.S. 379, 395. We however, note that the inclusion of a scienter requirement does not render a statute automatically constitutional. The federal court, which held R. C. 2923.04(A)(4) to be unconstitutional, in reviewing United States Supreme Court precedent stated:

"* * * [W]hile that Court has held that the presence of a scienter element *may* save a statute which otherwise would be unconstitutionally vague * * * [citations omitted], the Supreme Court has never to our knowledge held that the imposition of a scienter element upon a statute necessarily renders the statute's prohibitions sufficiently precise to withstand a vagueness challenge." *Amusement Devises Assn.* v. *Ohio*, *supra*, at page 1051.

tion of "criminal syndicate" contained in R.C. 2923.04 (C). A criminal syndicate is defined as "five or more persons collaborating to promote or engage in": (1) extortion or coercion; (2) prostitution; (3) theft; (4) gambling; (5) illegal traffic in drugs, liquor, or firearms; (6) usury; or (7) any offense for the purpose of gain.

The first six parts of R. C. 2923.04 (C) incorporate by reference many specific offenses. These offenses range in classification from a minor misdemeanor (public gaming, R. C. 2915.04[D]) to a first degree felony (illegal trafficking in drugs, R. C. 2925.03 (D) [6] and [7]. The final part of R. C. 2923.04 (C) includes any offense for the purpose of gain. It is not clear that this subsection is intended to be limited only to *financial* gain. Even assuming, *arguendo,* that it is limited to monetary gain, it is still broad enough to encompass minor disdemeanors such as violating the state's home solicitation requirements. R. C. 1345.21 *et seq,* and R. C. 1345.99. This provision leaves one unable to determine precisely how many separate offenses are included under R. C. 2923.04 (C), because a great percentage of our Criminal Code proscribes offenses committed for financial gain. Additionally, it is also difficult in some instances to determine whether the perpetrator who violates a statute does so for the purpose of gain in any sense of that word.

The lower courts have properly pointed out that the criteria chosen by the General Assembly to mark the boundaries of the statute are extremely broad and bring many activities within the statute that would not normally be considered to be conduct engaged in by organized crime. Five persons who participate in a betting pool each time they atend a football game would fall within this definition of a criminal syndicate because their conduct constitutes a violation R. C. 2915.04, governing public gaming. These

persons, however, without clear notice from R. C. 2923.04, have no way of knowing that they are committing a felony of the first degree and are thus subject to a posible jail sentence of 25 years and a $10,000 fine. The nature of their conduct itself does not indicate to them the penalties that are possible. R. C. 2923.04 makes no distinctions in its sentencing provisions but requires the same sanctions regardless of the nature and gravity of the underlying offense. In viewing this situation it is clear that the statute's requirements are simply not sufficient to limit its application to established criminal operations.[5]

In addition, the General Assembly has delegated a great deal of discretion to prosecutors who may choose to treat

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[5] Appellant calls our attention to R. C. 109.83(A), a statute not in Ohio's Criminal Code, but contained within a chapter which defines the power of the state Attorney General's office. R. C. 109.83(A) states that:

"When directed by the governor or general assembly, the attorney general may investigate any organized crime activity in this state. 'Organized criminal activity' means any combination or conspiracy to engage in criminal activity as a significant source of income or livelihood, or to violate, or aid, abet, facilitate, conceal, or dispose of the proceeds of the violation of, criminal laws relating to prostitution, gambling, counterfeiting, obscenity, extortion, loan sharking, drug abuse or illegal drug distribution, or corruption of law enforcement officers or other public officers, officials, or employees."

The definition of "organized criminal activity" contained in this statutory provision indicates that the General Assembly perceived the precepts of such activity much more narrowly in this investigative context when it enacted this statute several years prior to the passage of R. C. 2923.04.

This definition cannot be read into R. C. 2923.04 to limit its application. The term "criminal syndicate" is used throughout R. C. 2923.04, and its definition is in irreconcilable conflict with the one contained in R. C. 109.83(A). The term "organized crime" appears only once within the text of R. C. 2923.04, and in no way acts to define the conduct proscribed by the statute. See R. C. 2923.04(B). The only purpose the definition may serve in this context is to further confuse those individuals who seek to determine if their conduct falls within statutory prohibitions regarding organized crime.

these individuals as if they are engaging in organized crime or who may simply prosecute them for a minor misdemeanor, which involves a maximum $100 fine.[6] While prosecutors have a certain amount of discretion inherent in the charging of every defendant, we can think of no situation to compare with the discretion given here, with two possibile offenses on opposite ends of the penological spectrum, chargeable from the same conduct.

We note these shortcomings of R. C. 2923.04 not to question the wisdom of the legislation's provisions, but to demonstrate the great number of individuals and the diverse factual situations that are brought within the statute. The scienter element, and portions of the statute to be discussed hereinafter, must be of sufficient clarity, that they put persons of common intelligence on notice that their conduct violates R. C. 2923.04. Their conduct, in and of itself, may not seem to make them subject to penalties of this magnitude. We are requiring significant precision in this context, a situation where many activities have been elevated to first degree felonies.

A third problem with R. C. 2923.04 (A) is the undefined term "facilitate." No guidance is given in this statute as to the point at which incidental assistance to a criminal syndicate is transformed into "facilitation," which will render one open to harsh criminal sanctions. It is also not clear whether one must act affirmatively to be brought within this term, or whether a person by failing to act may be found to "facilitate" the activities of a criminal syndicate. One trying to ascertain whether his conduct is unlawful under this provision must guess at the meaning of the statute, contrary to the demands of due process of law.

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[6] See Comment, The Disparate Sentencing Provision of Ohio's Organized Crime Statute, 46 Univ. of Cinn. L. Rev. 583.

The Committee Comment to R. C. Chapter 2923 states that R. C. 2923.04 is based largely upon the proposed Federal Criminal Code. In that code, criminal facilitation requires that a defendant knowingly provide "substantial assistance" to a person intending to commit felony.[7] A similar definitional provision is necessary in R. C. 2923.04, for as it stands the statute indicates that there may be a conviction for "facilitation" on evidence that would not suport a conviction for aiding and abetting. The statute, however, nowhere indicates the degree to which an individual's conduct must tie him to a particular criminal venture.

We also question attaching the same culpability and punishment to one who merely facilitates (whatever that term may mean), the activities of a criminal syndicate, as to one who actually organizes it and actively participates in its operation. The failure to distinguish between the organization's leaders and those who merely assist the syndicate by providing goods and services or other innocuous aid further illustrates the defective nature of the statute.

A fourth major difficulty with the statute is that the definitional term "continuing basis," contained in subsection (C) of R. C. 2923.04, is susceptible to more than one meaning. R. C. 2923.04 defines a criminal syndicate to encompass five or more persons who promote or engage in enumerated activities on a *continuing basis*. This requirement appears intended to limit the statute's reach to established criminal operations, but this provision apparently applies with equal force to a group which kidnaps an individual and detains him for several weeks or, indeed,

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[7] See, Note, The Proposed Federal Penal Code, 47 N.Y.U. L. Rev. 320, 341.

for several hours or minutes. There is only one offense, but it is committed on a continuing basis. In comparable federal legislation similar terminology is clearly defined to encompass a minimum number of offenses, and a maximum period of time over which these offenses must occur. See Paragraph 5 of Section 1961, Title 18, U.S. Code. Anyone viewing this statute is unable to ascertain whether two offenses committed within ten years will bring about criminal responsibility under the statute. Due to the fact that there is no definition of what constitutes a "continuing basis" this basic policy decision is impermissibly delegated to prosecutors and judges for resolution on an *ad hoc* basis. *Grayned* v. *Rockford, supra.*

The fifth and final area which is unconstitutionally vague is subsection (A) (5) of R. C. 2923.04. This section imposes criminal liability on all persons who "[c]ommit, or conspire or attempt to commit, or act as an accomplice in the commission of, *any offense of a type in which a criminal syndicate engages on a continuing basis.*" Aside from the difficulty of determining what constitutes a continuing basis, discussed *supra,* this subsection demonstrates failure by the General Assembly to provide an ascertainable standard of guilt. The offense which the provision seeks to prohibit is not defined. Further, the creation of boundaries of the conduct sought to be prohibited by this subsection has been delegated to those who engage in criminal activities. It is the criminal syndicate that will decide what offenses to engage in on a continuing basis. Their decision will determine what conduct on the part of *others* will in the future constitute a violation of R. C. 2923.04 (A) (5). Just as a legislative body may not delegate basic policy decisions to prosecutors and judges, such matters may not be delegated to the very criminals to be reached under a penal statute. This provision, with its circular wording

exemplifies the vagueness that renders this statute unconstitutional.

The defects in the statute discussed *supra* are highlighted when the statutory subsections are read together with their definitional subsections. For example, the ordinary person is expected to comprehend the following:

"No person, with purpose to facilitate any of the activities [R. C. 2923.04 (A)] of five or more persons, collaborating to engage in [R. C. 2923.04 (C)] any offense for gain [R. C. 2923.04 (C) (7)], shall attempt to commit any offense of a type in which a criminal syndicate engages on a continuing basis [R. C. 2923.04 (A) (5)]."

The statute read in this manner, as it must be under certain circumstances, gives no notice of what conduct is proscribed. It indicates the General Assembly's failure to meaningfully define this offense.

We recognize that by holding R. C. 2923.04 unconstitutional, we have struck down a statute that dealt with an extremely significant problem in our society. We also realize, however, that in the statute's wake organized crime may still be effectively prosecuted for the underlying offenses contained in R. C. 2923.04, as well as for the crime of conspiracy. The objective of the legislation cannot be questioned, but its sweeping reach and its imprecise terminology are incompatible with due process requirements. These constitutional considerations may not be dismissed merely because there is a laudatory legislative end sought to be achieved.

Accordingly, the judgments of the Courts of Appeals for Cuyahoga and Hamilton Counties are affirmed.

Judgment affirmed in case No. 79-728.

Judgment affirmed in case No. 79-1124.

CELEBREZZE, C. J., W. BROWN and SWEENEY, JJ., concur.

HERBERT, LOCHER and HOLMES, JJ., dissent.

LOCHER, J., dissenting. The majority, in the first paragraph of its opinion, properly recognizes the necessity for R.C. 2923.04 Yet, before commenting that the statute in the instant cause does not pass constitutional muster, they preface their opinion with a disclaimer for their finding of unconstitutionality. That determination is disappointing considering that the aim of the statute is to effectively combat the abhorrent escalation of organized crime, which is often accompanied by acts of terrorism or illegal use of group pressure in order to achieve unlawful ends.

The majority did address the issue of vagueness as it pertains to R. C. 2923.04, but they failed to discuss the statute on all the issues presented to this court. Additional issues questioning whether the statue is overbroad in its scope or cruel and unusual in its punishment, or both, were also properly raised and thereby warrant discussion.

The majority's failure to address all the issues not only gives little guidance to the General Assembly in the probable redrafting of this statute, but also precipitates additional prolonged "piecemeal" judicial analysis and determinations on matters presently before this court.

These two cases and those 16 causes held by this court pending the outcome of this decision—encompassing the gamut of offenses, which includes drugs, prostitution, pornography, extortion, influencing public officials, as well as the commonplace murder, theft and assault—have already labored through the crucible of appeal and warrant more than a summary dismissal of the total statute on one limited ground. If new legislation will be forthcoming with issues now extant, but unaddressed by the majority, a final determination as to the constitutioality of any new legisla-

tion in this area will, regrettably, remain in limbo without resolution for many upcoming years.

In my view, R. C. 2923.04 is constitutional not only on the issue of vagueness, but also on the issue of overbreadth and also on the charge that the statute at bar is cruel and unusual in the punishment to be meted out upon conviction.

In prelude to a separate discussion of the three issues presented herein, I take exception to the majority approach. They advance a microscopic view of certain words and phrases in the statute and then enlarge those words and phrases to disproportionate extremes beyond their plain meaning and thereby find constitutional dilemmas within the statute.

Furthermore, the majority and the appellees are consistently jousting with phantoms when they conjure up interesting but incredibly naive and trivial hypotheticals in order to negate the statute *in toto*. If not kept within legitimate confines, every statute could be assailed in this fashion. To follow the analysis of the majority to its logical conclusion would result in a negation of any enforceable yet meaningful law in this area.

Organized crime envenoms our everyday life and unobtrusively robs each individual.[8] Inexorably, the hand of

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[8] The United States Chamber of Commerce gives examples of how organized crime affects our everyday life by its indirect imposition on legitimate business:

"Spiraling insurance costs that stem from the underworld's unique set of competitive methods; inequitable tax burdens resulting from the considerable tax-dodging ability of racketeer entrepreneurs; increasing consumer anger that is evoked when syndicate-owned enterprises supply inferior goods and services or when legitimate enterprises must raise prices to compensate for underworld harassment; growing reluctance by

the mob surreptitiously dips into everyone's pocket, pilfering millions annually to a degree which dwarfs the state's budget.

The General Assembly has picked up the gauntlet in this area, and the prosecutors have steadfastly acknowledged the combat in the legal trenches, while this court sits timorously by and cancels the contest. The result is the condonation of the premier malady eroding the vitals of society in all shapes and forms, to wit, the arrogant strength of organized criminal activity.

I will now embark upon the legal and philisophical bases, which buttress the constitutionality of the present statute.

I.

It is rudimentary that a legislative enactment is entitled to a strong presumption of constitutionality. *State* v. *Renalist, Inc.* (1978), 56 Ohio St. 2d 276, 278, and *State, ex rel. Jackman,* v. *Court of Common Pleas* (1967), 9 Ohio St. 2d 159, 161.

The Court of Appeals, in the *Forbes* case, found R. C. 2923.04 to be vague and overbroad, and, in the *Young* case, found R. C. 2923.04 (A) (1), (2), (3) and (5) void for vagueness. The statute at bar, when given a reasonable construction and fulfillment of its legislative intent and purpose, is definitely constitutional.

The United States Supreme Court, when pressed by a similar dilemma, stated, in *United States* v. *Harriss* (1954), 347 U.S. 612, at page 618, that:

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some commercial finance companies to extend credit to businesses unfortunate enough to be operating in a racketeer-infested industry." Chabber of Commerce of the United States, Deskbook on Organized Crime (Rev. Ed. 1972), 15.

"* * * [I]f this general class of offenses can be made constitutionally definite by a *reasonable construction of the statute,* this Court is under a *duty* to give the statute that construction. This was the course adopted in *Screws* v. *United States,* 325 U.S. 91, upholding the definiteness of the Civil Rights Act." (Emphasis added.)

Contra to the majority opinion, R. C. 2923.04 is not void for vagueness or overbroad in its scope when given a reasonable construction.

The doctrines of vagueness and overbreadth are not always distinguishable and often overlap. The United States Supreme Court, in *Grayned* v. *Rockford* (1972), 408 U.S. 104, at pages 108 and 114, distinguished the vagueness and overbreadth doctrines, explaining that "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined," whereas "[a] clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct."

That same court, in *Colten* v. *Kentucky* (1972), 407 U.S. 104, at page 110, explained that:

"* * * The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."

Furthermore, the element of intent has often preserved a statute from a challenge of vagueness, since the scienter requirement serves to relieve the statute of the claim that it punishs without warning an offense of which the accused is unaware. *Omaechevarria* v. *Idaho* (1918), 246 U.S. 343;

Hygrade Provision Co. v. *Sherman* (1925), 266 U.S. 497; *Gorin* v. *United States* (1941), 312 U.S. 19; *Screws* v. *United States* (1945), 325 U.S. 91; *American Communications Assn. CIO* v. *Douds* (1950), 339 U.S. 382; *Boyce Motor Lines, Inc.*, v. *United States* (1952), 342 U.S. 337; *United States* v. *National Dairy Products Corp.* (1963), 372 U.S. 29; *Cole* v. *Richardson* (1972), 405 U.S. 676; and *Colten* v. *Kentucky, supra.*

The statute at bar, R. C. 2923.04, reads, in pertinent part, as follows:

"(A) No person, with *purpose* to establish or maintain a criminal syndicate or to facilitate any of its activities * * *." (Emphasis added.)

"Purposely" is defined in R. C. 2901.22 (A) as follows:

"A person acts purposely when it is his *specific intention* to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his *specific intention* to engage in conduct of that nature." (Emphasis added.)

The statute, in the instant cause, specifically requires a purposeful act for both the establishment and maintenance of the criminal syndicate. "Purpose," as used in R. C. 2923.04, is synonymous with "intent." See *White* v. *Maxwell* (1963), 174 Ohio St. 186. The element of scienter is not absent from R. C. 2923.04 but is a necessary element thereof.

Furthermore, in subsection (C), the statute, in great detail, refers to specific sections of the Criminal Code. Many of the specific sections referred to in subsection (C) require the crime to be performed with specific intent.[9]

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[9] For example, all the sections below require a scienter element.

R. C. 2907.21, in pertinent part, reads:

In my opinion, the plain meaning of this statute, including its reference to specific sections of the Criminal Code, clearly mandates that the proscribed acts be done with specific intent and thus is outside the parameters of objections on the basis of vagueness.

This court, in *Cincinnati* v. *Hoffman* (1972), 31 Ohio St. 2d 163, 166, has stated that: "* * * [T]he injection of scienter provides a precise and comprehensible standard which is well within the ability of a person of common intelligence to understand."

The majority and the appellees maintain that certain words and phrases in R. C. 2923.04 are impermissibly vague. When discussing vagueness of certain words and phrases similar to the words and phrases in the statute at bar, the United States Supreme Court, in *United States Civil Service Comm.* v. *National Assn. of Letter Carriers* (1973), 413 U.S. 548, stated, at pages 577-579, as follows:

"(A) No person shall *knowingly*:

"(1) Compel another to engage in sexual activity for hire." (Emphasis added.)

R. C. 2907.22, as pertinent, provides:

"(A) No person shall *knowingly*:

"(1) Establish, maintain, operate, manage, supervise, control, or have an interest in a brothel." (Emphasis added.)

R. C. 2907.23, pertaining to procuring, in pertinent part, reads:

"(A) No person, *knowingly and for gain*, shall do * * * the following." (Emphasis added.)

R. C. 2913.01, pertaining to theft crimes, defines "deception" as "*knowingly.*"

R. C. 2915.02, dealing with gambling, provides, in part, as follows:

"(A)(1) [*k*]*nowingly* * * * engage in conduct that facilities * * * bookmaking * * *." (Emphasis added.)

R. C. 2923.04 is premised upon those crimes which require specific intent, but only when done by five or more persons on a continuing basis in which a significant income or livelihood is produced.

"There might be quibbles about the meaning of taking an 'active part in managing' or about 'actively participating in * * * fund raising' * * * but there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest."

So, too, with the statute at bar, the purpose of the statute as a whole does not lend itself to concise specific wording.[10]

The majority and the appellees go to great lengths in soothsaying a "parade of horribles" in which marginal cases should invalidate the statute at bar as being impermissibly vague.

It is firmly established that, if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be made where doubts might arise. *United States* v. *Petrillo* (1947), 332 U.S. 1, 7; *Jordan* v. *De George* (1951), 341 U.S. 223, 231.

This court, in *Cincinnati* v. *Hoffman, supra,* followed the above rationale of not allowing a "parade of horribles" to invalidate the statute. Paragraph three of the syllabus in that case reads:

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[10] By its very nature, "organized crime" is a very difficult phenomenon to define. "For most purposes the term 'organized crime' has no legal configuration, although some specific attributes of syndicated criminal operations can be accurately defined." National Association of Attorneys General, Organized Crime Control Legislation (1975), 3. Thus, the General Assembly did an admirable job in defining the slippery concept known as "organized crime."

"Where, under one state of facts, the operation of a statute is constitutional, a court will not declare it invalid because under another state of facts, not involved, its operation would be unconstitutional. (*State, ex rel. Herbert* v. *Ferguson,* 142 Ohio St. 496.)"

Not all laws are perfectly written, and to conjure up numerous nuances has a counteracting effect on the very purpose of the statute at bar. We should address ourselves to the intent and purpose of the law rather than be bogged down with the minutia of a prophecy of dire consequences by fecund imaginations of those who strive to derogate the meaning of the law.

Furthermore, the Committee Comment to R. C. Chapter 2923 states that R. C. 2923.04 is based largely upon the proposed federal Criminal Code, and, therefore, analysis of the federal statute is quite appropriate. At first blush, it is cognizable that the federal statutes are primarly directed at controlling "organized crime," much akin to R.C. 2923.04.

Section 1952 (a) (3), Title 18, U.S. Code, racketeering, prohibits interstate travel with intent to promote, manage, establish, carry on or facilitate unlawful activities.

Rather than making a determination that the federal statute is vague, the constitutionality of that section has been repeatedly upheld. The federal courts found the statute to prescribe clear standards for men of ordinary intelligence. *United States* v. *Villano* (C.A. 10, 1976), 529 F. 2d 1046, 1055, certiorari denied 426 U.S. 953; *Bass* v. *United States* (C.A. 8, 1963), 324 F. 2d 168, 173; *United States* v. *Barrow* (C.A. 3, 1966), 363 F. 2d 62, 65, certiorari denied 385 U.S. 1001; *United States* v. *Bash* (D.C. Ind. 1966), 258 F. Supp. 807, 809, affirmed *United States* v. *Miller* (C.A. 7, 1967), 379 F. 2d 483, certiorari denied 389

U.S. 930; *United States* v. *Teemer* (D.C. W.Va. 1963), 214 F. Supp. 952, 956.

The purpose and the language employed in both the federal statute and the statute at bar are similar. The Court of Appeals, in the *Forbes* case, dismissed any analysis of the federal statute in conjunction with the Ohio statute, on the grounds that the federal statute expressly limits the imposition of criminal liability to unlawful activity, whereas the Ohio statute does not so expressly limit itself.

As noted previously, it is the duty of this court, according to *United States* v. *Harriss, supra* (347 U.S. 612), to reasonably construe a statute to save it from unconstitutional claims. Thus, I readily note that it was never the intent of the General Assembly to punish innocent behavior. Furthermore, as previously discussed herein, to apply the scienter requirement to the commission of legal activities would be to expand the statute beyond its intended scope.[11]

The appellees, commenting upon the constitutionality of R. C. 2923.04, question the use of "five or more persons" as a jurisdictional requirement to invoke the statute at bar. I find the number "five" to be rationally related to the end sought by the General Assembly in enacting R. C. 2923.04. The number "five" as a jurisdictional requirement is present in at least three federal anti-criminal statutes, all of which have been held valid. See Sections 1511 (b) (1) (ii) and 1955 (b) (1) (ii), Title 18, U.S. Code, and Section 848 (b) (2) (A), Title 21, U.S. Code.

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[11] This writer is cognizant of *Amusement Devises Assn.* v. *Ohio* (S. D. Ohio 1977), 443 F. Supp. 1040, which declared only R. C. 2923.04 (A) (4) unconstitutional. The presence of the scienter requirement, coupled with the common-sense approach that only unlawful activity is prohibited, results in the *Amusement Devices Assn.* decision being inapposite herein.

For the foregoing reasons, a claim of vagueness in the instant cause is without merit. The language used contains a sufficient definite warning when measured by common understanding and practice. Even more simply stated, this court, in *Cincinnati* v. *Hoffman, supra,* when construing a similarly related statute, stated, at page 168:

"'"* * * *We believe that citizens who desire to obey the statute* will have no difficulty in understanding it * * *" *Colten* v. *Commonwealth,* 467 S. W. 2d 374, 378 (Ky. 1971).'" (Emphasis *sic.*)

II.

Appellees further assert that the statute in the instant cause is overbroad in its scope. The overbreadth doctrine may not appropriately be invoked here in this manner.

The United States Supreme Court, in discussing the overbreadth doctrine in *Broadrick* v. *Oklahoma* (1973), 413 U.S. 601, stated, at pages 610-613:

"Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. * * * A closely related principle is that constitutional rights are personal and may not be asserted vicariously. * * *

"In the past, the Court has recognized some limited exceptions to these principles, but only because of the most 'weighty countervailing policies.' * * * Another exception has been carved out in the area of the First Amendment.

"* * *

"* * * Application of the overbreadth doctrine in this manner is manifestly, strong medicine. It has been em-

ployed by the Court sparingly and only as a last resort. *Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.* * * *" (Emphasis added.)

A reasonable construction of the statute at bar to include a scienter requirement, coupled with the fact that R. C. 2923.04 should only apply to illegal and not lawful activities, insulate this statute from a claim of overbreadth.

The statute at bar prohibits criminal activity and not constitutionally protected activity. As the statute specifically states, activities such as bribery, extortion, promoting prostitution, theft, illegal trafficking in drugs and lending at usurious interest rates are clearly prohibited.

Furthermore, the statute is claimed to be so broad that even minor deviations or improper actions could result in a first-degree felony.[12]

I feel this interpretation is improper since the primary impetus of the statute is not directed at minor deviations from the law, but rather is to prevent the operation of entrenched criminal syndicates, which results in illegal and financially lucrative enterprises.[13]

The definition of "organized criminal activity" in R. C. 109.83 (A) reads, in pertinent part, as follows:

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[12] The appellees, in case No. 79-1124, who claim the statute at bar to be overbroad, assert the following "marginal" examples as rationale for declaring the statute unconstitutional:

"It could include the family of five who return home from their vacation each year with an unpurchased towel from their favorite motel" and "the two-table bridge club composed of suburban housewives who, once a month, travel downtown for a one-hour luncheon and fail to deposit dimes in the parking meter."

[13] The cases currently awaiting this decision and the *Young* case herein reflect the seriousness of the crimes that are to be prohibited by R. C. 2923.04.

In *State* v. *Young*, the net from the criminal activities in a seven-

"* * * 'Organized criminal activity' means any combination or conspiracy to engage in criminal activity as a *significant source of income or livelihood* * * *." (Emphasis added.)

Thus, even by definition, R. C. 2923.04 is limited to those activities which result in "a significant source of income or livelihood."

As noted herein, the federal anti-racketeering statute is much akin to the Ohio statute in language, purpose and design. The federal courts, when faced with similar arguments, dismissed them by noting that the anti-racketeering statute was not intended to include an occasional "floating crap game" or every "sporadic poker game." *United States* v. *Teemer, supra* (214 F. Supp. 952). See *United States* v. *Harris* (D.C. Va. 1967), 275 F. Supp. 161. Rather, the statute at bar is primarily designed to stem the clandestine flow of illegal profits of complicated networks of crime.

Accordingly, I find that R. C. 2923.04 is not overbroad in its scope in this instance.

III.

Appellees further assert that R. C. 2923.04 violates the Eighth Amendment's prohibition against cruel and unusual

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month period assertedly exceeded $100,000. *State* v. *Houlihan, supra,* involved a gambling operation where, as the Court of Appeals therein stated, "there would be $500.00 riding on every roll of the dice" and "this would make the house take $200.00 per hour and a six-hour night take home of $1200 for the house." *State* v. *Byars, supra,* involved an organized syndicate of nine persons engaged in trafficking of drugs. Another series of cases, currently pending in the First District Court of Appeals, involved syndicated organizations of car thieves, *i.e.*, persons who would strip stolen cars and sell the parts to certain used car dealers who then would sell the parts to the general public, which operation involved several hundred thousand dollars over a relatively short period of time.

Thus, the statute is directed and applied toward limiting the highly

punishment. A violation of the statute at bar constitutes a first-degree felony.

It is axiomatic that the General Assembly is lodged with the power to define, classify and prescribe punishment for crimes committed within the state. *State* v. *O'Mara* (1922), 105 Ohio St. 94, paragraph one of the syllabus, and *Ex Parte Fleming* (1930), 123 Ohio St. 16, 20.

The court, in *United States, ex rel. Bongiorno,* v. *Ragen* (D.C. Ill. 1944), 54 F. Supp. 973, referred to the earlier case of *Weems* v. *United States* (1910), 217 U.S. 349, wherein the United States Supreme Court stated that the Eighth Amendment is progressive and should be regarded as a precept that punishment for crime should be graduated and proportioned to the offense committed.

In *Rummel* v. *Estelle* (1980), 48 U.S. L.W. 4261, the United States Supreme Court stated, at pages 4263-4264:

"Given the unique nature of the punishments considered in *Weems*[14] and in the death-penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of im-

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sophisticated and widespread phenomenon, best described as "organized crime."

[14] In *Weems, supra,* the petitioner therein successfully attacked the imposition of punishment known as "*cadena temporal*" for the crime of falsifying a public and official document. The United States Supreme Court explicitly described the penalty meted out in *Weems,* at page 366, when it stated:

"• • • Its minimum degree is confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council. These parts of his penalty endure for the term of imprisonment. For other parts there is no intermission. His

prisonment in a state penitentiary, the *length of the sentence actually imposed is purely a legislative prerogative.*" (Emphasis added.)

A violation of the statute at bar, a felony of the first degree, results in an indeterminate sentence with a penalty (R. C. 2929.11). Each of the unlawful activities prohibited by R. C. 2923.04 constitutes a crime when committed by a single individual. The statute at bar upgrades the sentence in accordance with the gravity of the crime, when the unlawful activities are performed by five or more individuals who, on a coutinuing basis, derive significant income or gain therefrom.

The General Assembly recognized the state's compelling interest in preventing any furtherance of these pervasive criminal syndicates which continue to grow and yield lucrative financial gain.[15] Accordingly, the punishment meted out for violations of this statute is reasonable and not violative of the Eighth Amendment.

Accordingly, the judgments of the Courts of Appeals should be reversed.

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prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicile without giving notice to the 'authority immediately in charge of his surveillance,' and without permission in writing."

15 "• • • Organized crime affects the lives of millions of Americans, but because it desperately preserves its invisibility many, perhaps most, Americans are not aware how they are affected, or even that they are affected at all. The price of a loaf of bread may go up one cent as the result of an organized crime conspiracy, but a housewife has no way of knowing why she is paying more. If organized criminals paid income tax on every cent of their vast earnings everybody's tax bill would go down, but no one knows how much." Conklin, ed., The Crime Establishment, Organized Crime and American Society (1973), 29.

APPENDIX B

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-780309

STATE OF OHIO,

Plaintiff-Appellee,

vs.

CAROLYN YOUNG

Defendant-Appellant.

DECISION

(Filed April 4, 1979)

Messrs. Simon L. Leis and Thomas P. Longano, 420 Hamilton County Court House, Court & Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. Brett Goodson, 222 East Central Parkway, Cincinnati, Ohio 45202, for Defendant-Appellant.

PER CURIAM.

This cause came to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and the arguments of counsel.

Appellant was indicted with twenty-three others under Ohio's organized crime statute, R. C. 2923.04. After appellant moved to dismiss the indictment on the basis that R. C. 2923.04 was unconstitutional, which motion was overruled by the trial court, appellant entered a plea of no contest to the charge of engaging in organized crime. Appellant was found guilty, sentenced, and subsequently filed a timely notice of appeal.

Appellant's only assignment of error, that the trial court erred in overruling her motion to dismiss, presents us squarely with the issue of the constitutionality of R. C. 2923.04. That statute reads as follows:

> § 2923.04 Engaging in organized crime.
>
> (A) No person, with purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall do any of the following:
>
> (1) Organize or participate in organizing a criminal syndicate or any of its activities;
>
> (2) Provide material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit;
>
> (3) Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility;
>
> (4) Furnish legal, accounting, or other managerial services to a criminal syndicate;
>
> (5) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis;
>
> (6) Commit, or conspire or attempt to commit, or act

as an accomplice in the commission of, any offense of violence;

(7) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of bribery in violation of section 2921.02 of the Revised Code.

(B) Whoever violates this section is guilty of engaging in organized crime, a felony of the first degree.

(C) As used in this section, "criminal syndicate" means five or more persons collaborating to promote or engage in any of the following on a continuing basis:

(1) Extortion or coercion in violation of section 2905.11 or 2905.12 of the Revised Code;

(2) Compelling or promoting prostitution, or procuring in violation of 2907.21, 2907.22, or 2907.23 of the Revised Code;

(3) Any theft offense as defined in section 2913.01 of the Revised Code;

(4) Any gambling offense as defined in section 2915.01 of the Revised Code;

(5) Illegal trafficking in drugs of abuse, in intoxicating or spirituous liquor, or in deadly weapons or dangerous ordnance as defined in section 2923.11 of the Revised Code;

(6) Lending at usurious interest, and enforcing repayment by illegal means;

(7) Any offense, for the purpose of gain.

(D) A criminal syndicate retains its character as such even though one or more of its members does not

know the identity of one or more other members, and even though its membership changes from time to time.

Under the language of the indictment, appellant was charged under R. C. 2923.04 (A) (1), (2), (3), and (5). We will examine those subsections to determine their constitutionality. As our examination is limited to a discussion of whether these subsections are facially unconstitutional, we find no need to look at the language of the indictment. If a challenged provision is repugnant to the due process clause of the Fourteenth Amendment, specification of details of the offense intended to be charged will not serve to validate it. *Lanzetta* v. *New Jersey* (1939), 306 U.S. 451.

To determine whether these subsections are indeed violative of the due process clause, there are certain broad principles of law which we must consider. The first essential of due process of law is that a criminal statute give fair warning of the conduct which it prohibits. If the terms of a penal statute are not sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, it is too vague to meet the notice requirements of due process. *Connally* v. *General Construction Co.* (1926), 269 U.S. 385, 46 S. Ct. 126. No one may be required at peril of life, liberty or property to speculate as to the meaning of a penal statute. *Lazetta* v. *New Jersey, supra.* Thus, due process requires criminal laws to be explicit for several reasons: to avoid trapping the innocent by providing fair warning of what is prohibited so that one may act accordingly; to prevent impermissible delegation of basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis; and, to avoid arbitration and discrim-

inatory enforcements. *Grayned* v. *City of Rockford* 408 U.S. 104, 92 S. Ct. 2294.

What conduct is proscribed by subsections (A) (1), (2), (3) and (5)? These sections all prohibit certain action in connection with any activities of a criminal syndicate. The legislature has defined a "criminal syndicate" as five or more persons, one or more of whom need not know the identity of one or more others, yet who collaborate to promote or engage on a continuing basis in extortion, prostitution, theft, gambling, illegal traffic in drugs, liquor, or weapons, or in any offense for the purpose of gain. R. C. 2923.04 (C) (7) and (D). This broad definition of "criminal syndicate" encompasses every imaginable offense which is committed on a continuing basis and in which at least five people are involved in some capacity. While this language would certainly include the established operations thought of as "organized crime" we find it does nothing to exclude other groups of people who would be astonished to learn that R. C. 2923.04 has designated them a member of a criminal syndicate. What of the five people who work together at a federal courthouse and who arrange to supply alcoholic beverages for their office parties? What of the family of five who every year cuts a Christmas tree from the property of another without permission? Can it be said that "criminal syndicate" is defined with such specificity as to give a man of ordinary intelligence notice of what a "criminal syndicate" is? We think not. Even if we temporarily put aside the difficulties inherent in the definition of "criminal syndicate," the notice problem becomes even more apparent when one considers that, under the language of the statute one need not participate in the offense committed by the syndicate, or be one of the five people that comprise the syndicate, to be found guilty of engaging in organized crime.

Let us consider R.C. 2923.04 (A) (1), which forbids one to organize or to participate in organizing a criminal syndicate or *any of its activities* (emphasis added). Organizations which may well fall within the ambit of the broad definition of criminal syndicate in R.C. 2923.04 are nevertheless capable of carrying on numerous activities which may be perfectly legal. Those established operations more commonly thought of as "organized crime" may have more than one legitimate business operation in addition to whatever illegal activities they may promote. One who participates in organizing one of these legal activities, even one who has no connection with the unlawful side of the organization, has, under the statute, performed the requisite guilty act. The same situation exists with respect to R.C. 2923.04 subsections (A) (2) and (A) (3), which prohibit providing material aid to any of the activities of a criminal syndicate and managing, supervising, or directing any of the activities of a criminal syndicate. It is perfectly conceivable that under such vague language one engaging in an otherwise lawful occupation has performed an act prohibited by the wide sweep of the organized crime statute. Consider the banker who authorizes credit to a "criminal syndicate" for the purpose of purchasing property to be used for a legitimate apartment complex, the real estate broker who locates and organizes the purchase of the necessary real estate, and the person who manages the complex once it is completed. It is our opinion that language which subjects one to criminal penalties for conduct which would normally, and except for the statute, be considered lawful oversteps the bounds of due process. Men of ordinary intelligence have no way of ascertaining what conduct on their part may subject them to arrest and prosecution.

The lack of notice of what constitutes criminal conduct

under R.C. 2923.04 becomes even more obvious when one considers that the exceptionally broad language of the scienter element is not limited to a purpose to facilitate only *illegal* activities of a criminal syndicate. One need only have a purpose to facilitate any of the activities of such an organization. As pointed out by the United States District Court for the Southern District of Ohio, Eastern Division, in striking down R.C. 2923.04 (A) (4) as unconstitutional, "[W]hile the Supreme Court has held that the presence of a scienter element *may* save a statute which would otherwise be unconstitutionally vague, (citations omitted), the Supreme Court has never . . . held that the imposition of a scienter element upon a statute necessarily renders the statute's prohibitions sufficiently precise to withstand a vaguenes challenge." *Amusement Devices Ass'n.* v. *State of Ohio* (S. Dist., Ohio, E.D., 1977), 443 F. Supp. 1040, 1051. Certainly a scienter element as vague as that in R.C. 2923.04 does nothing to help clarify the conduct proscribed under the catch-all definition of engaging in organized crime.

We find that the statement by the court in *Ricks* v. *District of Columbia* (D.C. Cir., 1968), 414 F.2d 1097, 1101, aptly describes the situation we encounter in dealing with R.C. 2923.04:

> . . . [A] criminal statute perishes on constitutional grounds when it leaves speculative the task for ascertaining the line separating guilty from innocent acts.

It is our decision that because of the statute's ill-defined concept of what constitutes a criminal syndicate, and the statute's prohibition against otherwise lawful courses of conduct, *unlimited by a scienter element,* R.C. 2923.04 (A) (1) (2) (3) and (5) are unconstitutionally void for vagueness in violation of the Due Process Clause of the

Fourteenth Amendment to the United States Constitution.

We note also that governmental regulation for the public welfare must be accomplished by methods consistent with due process. A law which is unreasonable, arbitrary and capricious and which selects means that have no real or substantial relation to the result sought to be attained is inconsistent with due process standards. *Nebbia* v. *People of State of New York* (1934), 291 U.S. 502, 54 S. Ct. 505. We do not find that a statute so sweeping in its reach as R. C. 2923.04 is reasonably related to the legislature's object in controlling organized crime on a small or large scale. Nor do we see a rational basis for the number five as a borderline for the purpose of denominating activities as "engaging in organized crime" which otherwise would be classified as misdemeanors. These activities have suddenly been elevated to first degree felonies carrying penalties of a possible sentence of 7 to 25 years in prison and up to a ten thousand dollar fine when five or more people are involved. We find it nothing less than capricious, for instance, that someone engaging in "public gaming," a gambling offense encompassed by R. C. 2915.01 which is ordinarily a minor misdemeanor carrying a maximum fine of $100.00 and no possibility of imprisonment, may now be subject to the same punishment as one convicted of aggravated robbery, kidnapping, or rape, if the public gaming is done in concert with four other persons. R.C. 2923.04 (C) (4).

Appellant's assignment of error is sustained. The judgment of the trial court is reversed, and appellant is discharged.

SHANNON and CASTLE, J. J.

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[1] *State* v. *Houlihan*, No. 11-CA-78 (5th Dist. Nov. 1, 1978), *State* v. *Byars*, No. CA 8543 (9th Dist. 21, 1977).

KEEFE, P. J., CONCURS.

KEEFE, P. J. CONCURRING.

I agree with the result enunciated in the decision. However I do not join in the determination that the use of the number five in the subject statute has no rational basis. The legislature's selection of that particular number of persons is not in any way unreasonable as I see it. Moreover, I have no problem whatsoever with the subject statute's elevation of penalty for the commission of a crime or crimes by five or more persons, over and above the penalty if such are committed by fewer than five. The true fatal infirmities of R.C. 2923.04 are its vagueness and its overbreadth.

I include a word about the penalty provision of R.C. 2923.04. Because of the great number of possible activities to which a proper criminal syndicate law may apply — differing in their anti-social impact and seriousness — such a criminal statute could well include a range of penalties instead of only one. As punishment for the commission of certain serious crimes, the present penalty could well be appropriate.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX C

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18 U.S.C. 1961
RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

"Section 1961. Definitions

As used in this chapter—

(1) 'Racketeering activity' means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of Title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to

unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501 (c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) 'person' includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) 'unlawful debt' means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) 'racketeering investigator' means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) 'racketeering investigation' means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) 'documentary material' includes any book, paper, document, record, recording, or other material; and

(10) 'Attorney General' includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any depart-

ment or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

APPENDIX D

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18 U.S.C. 1962

"Section 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."